

2010

# Ollie Blair v. Precision Tool, Great American Alliance Insurance, Ohio Casualty Insurance, Labor Commission of Utah : Brief of Appellant

Utah Court of Appeals

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Thomas C. Sturdy; Blackburn & Stoll; Alan L. Hennebold; attorneys for respondents.

Richard R. Burke; King & Burke; attorneys for appellant.

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IN THE UTAH COURT OF APPEALS

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|--------------------------------|---|--------------------|
| OLLIE BLAIR,                   | ) |                    |
|                                | ) | Court of Appeals   |
| Petitioner / Appellant,        | ) | Case No.: 20100646 |
|                                | ) |                    |
| vs.                            | ) |                    |
|                                | ) |                    |
| PRECISION TOOL, GREAT AMERICAN | ) | Priority No. 7     |
| ALLIANCE INSURANCE, OHIO       | ) |                    |
| CASUALTY INSURANCE, and        | ) |                    |
| LABOR COMMISSION OF UTAH,      | ) | Labor Commission   |
|                                | ) | Case No.: 07-0162  |
| Respondents / Appellees.       | ) |                    |

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**REPLY BRIEF OF PETITIONER / APPELLANT OLLIE BLAIR**

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Appeal from the Utah Labor Commission

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Thomas C. Sturdy  
BLACKBURN & STOLL, LC  
Attorneys for Respondents / Appellees  
257 East 200 South, Suite 800  
Salt Lake City, Utah 84111

Alan L. Hennebold  
Deputy Commissioner  
Labor Commission of Utah  
Attorneys for Respondents / Appellees  
160 East 300 South, 3<sup>rd</sup> Floor  
P.O. Box 146615  
Salt Lake City, Utah 84114-6615

Richard R. Burke  
KING & BURKE, P.C.  
Attorneys for Petitioner/Appellant  
7390 South Creek Road, #104  
Sandy, Utah 84093

**PETITIONER / APPELLANT RESPECTFULLY REQUESTS ORAL  
ARGUMENT AND THAT THIS CASE BE REPORTED**

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Thomas C. Sturdy  
BLACKBURN & STOLL, LC  
Attorneys for Respondents / Appellees  
257 East 200 South, Suite 800  
Salt Lake City, Utah 84111

Alan L. Hennebold  
Deputy Commissioner  
Labor Commission of Utah  
Attorneys for Respondents / Appellees  
160 East 300 South, 3<sup>rd</sup> Floor  
P.O. Box 146615  
Salt Lake City, Utah 84114-6615

Richard R. Burke  
KING & BURKE, P.C.  
Attorneys for Petitioner/Appellant  
7390 South Creek Road, #104  
Sandy, Utah 84093

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## ARGUMENT

This is a simple, straightforward appeal that centered on the ALJ's inadequate findings of fact that were made before the case was sent to a medical panel. There were two errors: 1) the findings did not include the scope of the admitted industrial injuries from the parties' pleadings; 2) following the accident, the findings failed to detail the eight years of of undisputed left leg and low back symptoms that culminated in the surgical request at issue. The remaining issues on appeal – the standard of review, and if the natural result rule did apply to the facts, how it should be applied – are secondary issues that turn on this Court's resolution of the adequacy of the findings.

The entire appeal turned on the adequacy of the ALJ's findings of fact as to the scope of the admitted injuries, and/or failure to make findings as to the undisputed eight year history of leg and low back symptoms. But Respondents' Brief failed to join issue on both of these central issues. Instead, it offered straw man arguments, and never confronted the specific issues raised in Mr. Blair's Brief. This Court should grant Mr. Blair's appeal, reverse this case, and remand it to the Labor Commission of Utah.

I. This Court Should Hold That Mr. Blair's L3/4 and L4/5 Injuries Were Caused By The Accident, And Find That Respondents' Brief Failed To Join Issue On This Point.

Respondents admitted that Mr. Blair aggravated or injured his low back in the industrial accident, including at L3/4 and L4/5<sup>1</sup>, and this Court should remand this case to

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<sup>1</sup> Mr. Blair's low injury to L5/S1 was never disputed by Respondents. To the contrary, they paid an impairment rating, in part, on the basis of a damaged disc at that level. The entire scope of Mr. Blair's industrial injuries to L3/4 and L4/5, however, and

correct the Commission's error. Mr. Blair specifically identified the scope of his industrial injuries to L3/4 and L4/5 in his application for hearing and attachments. Brief at 1, R1-7. The rules required the Answer to "admit or deny liability for the claim and shall state the reasons liability is denied." UAR 602.2.1 C.; Brief at 3. If Respondents did not believe that Mr. Blair injured his low back at L3/4 and L4/5, they had raise that defense as a threshold matter. Not only that, they had a duty to state that affirmative defense, "with sufficient accuracy and detail [so] that the petitioner and the [Commission] may be fully informed of the nature and substance of the defenses asserted." *Id.* Respondents' Answer admitted Mr. Blair's accident, and did not challenge the scope of the L3/4 and L4/5 injuries. Brief at 2. That was the end of the analysis. Respondents' Brief never confronted that issue.

The Commission was bound by Respondent's admissions. The Answer could have denied that the accident medically caused the injuries Mr. Blair pled, but did not. By waiving the defense of medical causation to those industrially-caused injuries, Respondents' Answer admitted the scope of Mr. Blair's industrial low back injuries. Brief at 2-3. The ALJ was bound to make findings as to the scope of the industrial injuries established by the pleadings, but did not. As a result, the entire case proceeded on a flawed factual foundation and was errantly affirmed by the Labor Commission of

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the ALJ's failure to include the scope of those injuries in her findings, were central to the errors identified in Mr. Blair's brief.



Utah (the "Commission"). Brief at 1-2. The entirety of Mr. Blair's appeal proceeded from this simple legal premise. But Respondents' Brief failed to join this issue, and instead offered straw man arguments.<sup>2</sup> This Court should reverse the Commission, hold that Mr. Blair's low back injuries included L3/4 and L4/5, and remand this case for further findings consistent with the pleadings.

*A. The Commission's Straw Man Argument Did Not Address The Issue.*

The Commission's denial offered the same straw man that was later recycled in Respondents' Brief. The Commission misstated the issue, instead of confronting Respondents admission:

Even though Precision Tool admits that the accident medically caused Mr. Blair to sustain a low back injury, such an admission does not imply that that (sic) accident caused all of Mr. Blair's low back problems following the accident.

Order Affirming ALJ's Decision at 2, R 109 (emphasis added). This was disingenuous: Mr. Blair did not sustain an amorphous, undefined "low back injury"; he pled a specific

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<sup>2</sup> According to wikipedia:

A straw man is a component of an argument and is an informal fallacy based on misrepresentation of an opponent's position. To "attack a straw man" is to create the illusion of having refuted a proposition by substituting it with a superficially similar yet unequivalent proposition (the "straw man"), and refuting it, without ever having actually refuted the original position.

[http://en.wikipedia.org/wiki/Straw\\_man](http://en.wikipedia.org/wiki/Straw_man) (internal notations omitted).

low back injury that also included L3/4, and L4/5. Brief 1-2; R 1-7. Mr. Blair did not argue that the accident “caused all of his low back problems.” Instead, he specifically alleged injuries to L3/4 and L4/5 were included in the accident, and sought medical treatment at those specific levels in his application. The Commission never confronted Respondents’ admission as to the scope of the admitted injuries.

The Respondents’ admitted the scope of Mr. Blair’s work-related injuries narrowed the issue presented for the Commission’s review. The Commission failed to explain why it put the medical cause of Mr. Blair’s L3/4 and L4/5 injuries at issue when Respondents admitted those injuries. The Commission may not summarily reject the facts established in the pleadings, and arbitrarily place the entirety of Mr. Blair’s low back injuries at issue. This critical issue was raised in Mr. Blair’s Brief,<sup>3</sup> but not confronted in Respondent’s Brief. Instead, it argued that “formal evidentiary standards do not apply,” and that the appropriate test was whether the procedures were “necessary” to treat the industrial injuries. Respondents’ Brief at 16-17. But that argument begged the question of the scope of Mr. Blair’s industrial injuries – the central issue raised in his Brief.

*B. Respondents’ Straw Man Arguments Did Not Join Issue With The ALJ’s Inadequate Findings As To The Scope Of Mr. Blair’s Admitted Low Back Injuries To L3/4 and L4/5.*

Instead of joining this issue, Respondents offered a variation on the Commission’s straw man argument. Respondents’ Brief stated: “[A]dmitting medical causation does not

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<sup>3</sup> Brief at 3.

preclude Respondents from challenging further compensability.” Respondent’s Brief at 14. But that was not Mr. Blair’s argument. Instead, he asserted that admitting causation to the injuries he pled, precluded Respondents from challenging the scope of those injuries. Brief at 1-2. Respondents’ “superficially similar yet unequivocal proposition” was that their admission did not “preclude Respondents from challenging further compensability.” Respondent’s Brief at 14. The equivocal use of the term “compensability” disguised the Brief’s failure to join issue in Mr. Blair’s Brief, because “compensability” may have multiple meanings.

*C. Respondents’ Brief Equivocally Used The Term “Compensability.”*

This Court is well aware that “compensability” is a term of art in workers compensation. It is shorthand for stating that the legal requirements for an accident or medical treatment are met, and that the employer is responsible. There are three common examples relevant to this case. First, an accident was “compensable” if it arose out of and in the course of employment,<sup>4</sup> and was both the legal and medical cause of the

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<sup>4</sup> Utah Code Ann. § 34A-2-401(1)(a) and (b)(i) and (ii). The statute states:

An employee described in Section 34A-2-104 who is injured and the dependents of each such employee who is killed, by accident arising out of and in the course of the employee's employment, wherever such injury occurred, if the accident was not purposely self-inflicted, shall be paid . . . compensation for loss sustained on account of the injury or death; the amount provided in this chapter for: medical, nurse, and hospital services; medicines . . .

employee's injuries.<sup>5</sup> In this case, Respondents admitted that Mr. Blair was involved in a compensable accident, and did not dispute that the accident medically caused his injuries to L3/4 and L4/5, as pled by Mr. Blair.

Second, medical treatment – like the surgery and pain clinic treatments requested by Mr. Blair – may also be “compensable.” Subsequent medical treatment is generally compensable when the industrial injuries were a “contributing cause” of the need for the treatment at issue.<sup>6</sup> In this case, Respondents could have denied Mr. Blair's claim for medical treatment by pleading that the injuries from the accident did not contribute to his need for treatment. But they did not. Brief at 1-2; R 10-18.

Finally, the statute also requires employers to pay for medical treatment “necessary” to treat the employee's injuries.<sup>7</sup> Unnecessary medical treatment is not “compensable.” Respondents' Answer asserted that the medical treatment was not

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<sup>5</sup> *Allen v. Industrial Comm'n*, 729 P.2d 15 (Utah 1986).

<sup>6</sup> *McKesson v. Labor Comm'n*, 41 P.3d 468, 472 (Utah App. 2002). See discussion *infra*, at Part IV.

<sup>7</sup> Utah Code Ann. § 34A-2-418(1). The statute states:

In addition to the compensation provided in this chapter or Chapter 3, Utah Occupational Disease Act, the employer or the insurance carrier shall pay reasonable sums for medical, nurse, and hospital services, for medicines, and for artificial means, appliances, and prostheses necessary to treat the injured employee.

*Id.* (emphasis added).

“appropriate” because its doctor believed the treatment would not relieve Mr. Blair’s symptoms. Brief at 1, R10-18. In this case, “compensability” can only mean Respondents’ duty to pay for Mr. Blair’s allegedly “necessary” medical treatment because that was Respondents’ only defense.

Respondents Brief appeared to join issue, but did not. The Brief argued that “medical causation was admitted as to the initial injury, but the issue as to the extent of the compensability was still at issue.” Respondents Brief at 16 (emphasis added). The only “compensability” that was “still at issue,” however, was Mr. Blair’s requested medical treatment. Because Respondents only challenged the necessity of Mr. Blair’s surgery, its argument that “compensability was still at issue” did not speak to the scope of injuries pled by Mr. Blair. That was a critical distinction: The injuries to L3/4 and L4/5 were admitted in Respondents’ Answer, but omitted from the ALJ’s factual findings, and asserted as the central issue in Mr. Blair’s Brief.

*D. Respondents’ Brief Failed To Confront Its Own Admission That Mr. Blair’s Injuries Were Caused By The Industrial Accident.*

Respondents’ Brief tap-danced around the issue, but never confronted its admission. The Brief never addressed its Answer’s admission that Mr. Blair’s L3/4 and L4/5 were injured in the accident. Instead, the Brief suggested that Mr. Blair’s injuries to L3/4 and L4/5 were not medically caused by the accident.<sup>8</sup> The Brief’s circular reasoning

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<sup>8</sup> From its Statement of Facts: “[Dr. Leavitt] recommended surgery in the form of Left L3/4 and L4/5 laminotomy, decompression and possible discectomy. Please

that Mr. Blair's injuries were non-industrial because that is what the Commission concluded, never confronted the Commission's failure to find the facts admitted in Respondents' Answer. Respondents' Brief ducked the central issue raised in Mr. Blair's Brief.

The ALJ's failure to find that Mr. Blair's industrial injuries included L3/4 and L4/5 directly caused the confusion and error identified in Mr. Blair's brief. The panel questioned the medical cause of Mr. Blair's L3/4 and L4/5 injuries because the ALJ failed to make findings that those injuries were admittedly industrial. Brief xiii, R61-63. The ALJ did not recognize this issue (or simply disagreed without explanation) when she over-ruled Mr. Blair's objection to the panel report coming into evidence:

The Petitioner objects that the medical panel, in answering the question of medical necessity, first examined the question of medical causation. Because the question of medical causation was already conceded, the panel should not have evaluated this question. However, the question put to the medical panel was concerning what care was necessary to treat industrial conditions. The first thing the panel must determine in answering this question is what conditions are industrial. It was therefore appropriate for the panel to examine this question.

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note, those are not the levels at which Mr. Blair had the herniated disc after the industrial accident." Respondents' Brief at 9-10.

Under Point 1: "[T]he ALJ correctly remitted this matter to a medical panel who opined that while the treatment provided to Petitioner through June 9, 2000 was appropriate on an industrial basis, after that date Petitioner returned to baseline with his pre-existing degenerative condition and, therefore, any treatment rendered after that date was necessitated by non-industrial caused conditions." Respondents' Brief at 15.

Findings of Fact, Conclusions of Law & Order (May 6, 2008) R 75 (emphasis added).

But the panel did not need to “determine what conditions were industrial”; Respondents already admitted L3/4 and L4/5 were part of Mr. Blair’s injuries in its Answer. The ALJ’s findings were inadequate as a matter of law, and prejudiced Mr. Blair.

This Court should hold that Respondents’ Answer admitted the scope of Mr. Blair’s industrial low back injuries, including L3/4 and L4/5, because it failed to challenge that the accident was the medical cause of those injuries. This Court also hold that the ALJ’s findings were inadequate as a matter of law and resulted in prejudicial error because they failed to include the scope of Mr. Blair’s industrial injuries at L3/4 and L4/5. This Court should reverse the Commission’s Order Affirming ALJ’s Decision, which ratified the ALJ’s prejudicial error. This Court should remand this case to the Commission for further findings, consistent with the parties’ pleadings and the narrow issues preserved for resolution, and to convene a new medical panel who has not already opined that the admitted industrial conditions were non-industrial.

II. Respondents’ Brief Failed to Join Issue On The Inadequacy Of The ALJ’s Interim Order. And Argued Without Authority That Mr. Blair Should Have Objected To The Interim Order.

This Court should hold Interim Order failed to contain sufficiently detailed findings of fact, were legally inadequate, led to confusion and error on the part of the medical panel, and were never corrected by the ALJ or the Commission on appeal. Brief

at 9.<sup>9</sup> As set forth above, the ALJ failed to make findings as to the scope of Mr. Blair's industrial injuries to include L3/4, L4/5 and L5/S1.<sup>10</sup> But apart from that error, the ALJ's findings were also legally inadequate because they failed to contain relevant, undisputed record evidence, with narrowly tailored issues, so that the medical panel could perform its very limited role as medical fact-finder.

The following undisputed facts were established at the hearing: Mr. Blair was the only witness at the hearing; he testified to his eight year history of low back and leg pain after the accident; he testified that his progression of symptoms led to the surgical recommendation at issue; there were more than twenty mentions of leg and low back symptoms in the medical records exhibit; and, the only issue was whether the proposed medical treatment (surgery and pain clinic visits/epidural injections) would relieve his symptoms.

The ALJ had a legal duty to make adequate findings as to the eight years of left leg and low back symptoms that led to the surgical recommendation at issue. As set forth in Mr. Blair's Brief, Labor Commission factual findings must be "sufficiently detailed and include enough subsidiary facts to disclose the steps by which the ultimate conclusion on

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<sup>9</sup> Mr. Blair asserted the findings from the Interim Order lacked so much detail and substance, and omitted relevant undisputed record evidence, to the extent that the findings would still have been legally deficient, even if the ALJ had made findings as to the scope of his admitted industrial injuries discussed in Part I. Brief at 9-20.

<sup>10</sup> See discussion, *supra*, Part I.



each factual issue was reached.”<sup>11</sup> Otherwise, the Commission’s failure to make “adequate findings of fact in material issues renders its findings ‘arbitrary and capricious’ unless the evidence is “clear, uncontroverted and capable of only one conclusion.””<sup>12</sup>

But the Interim Order contained only two brief paragraphs as to the eight years of undisputed left leg and low back symptoms that followed Mr. Blair’s industrial accident. One paragraph – consisting of only three sentences – mentioned his left leg symptoms once, and contained a single citation to the medical records. The panel later concluded – presumably because of the ALJ’s truncated finding on Mr. Blair’s left leg symptoms – that his left leg symptoms had “essentially resolved” within a few months of the accident. Brief 16,17; R62.<sup>13</sup> The panel’s finding contradicted the undisputed record evidence. And not a little evidence: There were over twenty mentions of left leg and low back symptoms in the 94 page exhibit that spanned those eight years. Brief at 11-12.

The other two sentence paragraph contained no discussion of his ongoing left leg symptoms. Instead of detailing the twenty-plus mentions of left leg and low back symptoms over that period, the ALJ merely found that “Over the years the Petitioner

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<sup>11</sup> *Nyrehn v. Industrial Comm’n*, 800 P.2d 330, 335 (Utah 1991), *cert. denied*, 815 P.2d 241 (Utah 1991) (quoting *Acton v. Deltran*, 737 P.2d 996,999 (Utah 1987) with approval).

<sup>12</sup> *Id.* at 335 (quoting *Kinkella v. Baugh*, 660 P.2d 233, 236 (Utah 1983) with approval).

<sup>13</sup> As discussed below, there was literally no evidence to support this finding. See discussion *supra*, Part III.

sought treatment for his low back now and then when it would ‘act up.’ Eventually surgery was recommended by Dr. Jodie Levitt.” Brief at 10; R37. But there were no findings as to Mr. Blair’s progressive leg and low back symptoms that lead to the surgical recommendations. That omission was prejudicial because it sounded like there was no connection between Mr. Blair’s symptoms and the “eventual” surgical recommendation. In the absence of those findings, the panel concluded that there was no connection between the accident and the surgery, even though Respondents never raised a medical causal defense to Mr. Blair’s treatment.

*A. Respondents’ Straw Man Arguments Did Not Join Issue With The ALJ’s Inadequate Findings As To Mr. Blair’s Undisputed Eight Year History Of Left Leg And Low Back Symptoms.*

Respondents’ Brief glossed over the ALJ’s omission of material facts. It argued: “The ALJ cited to the material records relevant to the medical dispute and provided an overview to the panel of his medical history.” Respondent’s Brief at 26. Even if that generalization were true, the Brief failed to explain why Mr. Blair’s eight year progressive left leg and low back symptoms were not “material.” Further, labeling the two scant paragraphs an “overview” of Mr. Blair’s “medical history” did not speak to the adequacy of the ALJ’s findings. In contrast, Mr. Blair’s left leg symptoms were obviously important<sup>14</sup> to the medical panel: They found that his left leg symptoms had

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<sup>14</sup> Factual findings as to leg and low back symptoms are material in low back surgery cases. Generally, low back surgery like the treatment at issue is not performed to relieve solely low back pain; instead, low back surgery is performed to treat referred neurological symptoms that are manifested in the lower extremities. In other words,

“essentially resolved” within months of the accident, and denied his surgery because they believed he had “primarily low back pain, [and] would not be expected to benefit at all from that procedure.” Medical Panel Report at 2-3; R 62-3. Respondents’ Brief simply ducked the issue.

Respondents’ Brief resorted to straw man argument instead of confronting the ALJ’s omission of material facts from the findings. Respondents’ Brief misstated Mr. Blair’s argument - repeatedly:

Contrary to Petitioner’s argument, there is no requirement under Utah law that the ALJ or Commission’s findings of fact recite every medical record in the Medical Records Exhibit, or in this case, a full eight year history.

Respondents Brief at 23. And:

Petitioner argues that the ALJ “foisted” fact finding responsibility on the medical panel since the ALJ did not cite to every medical record within an eight year period after the industrial accident and did not describe the nature and scope of his medical condition, leaving the panel to “do this job.” . . . The ALJ was certainly not required to list every medical record contained in joint medical Records Exhibit in her Findings of Fact, Conclusions of Law and Interim Order.

Respondents’ Brief at 25-6. But Mr. Blair never claimed that the ALJ should cite to “every record”; only to the relevant records to the extent necessary to accurately detail his

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where low back surgery is at issue, findings as to leg and low back symptoms are material facts. The ALJ’s failure to make findings as to Mr. Blair’s left leg and low back symptoms in the eight years that followed the accident, were material omissions of undisputed evidence.

eight year history of left leg and low back symptoms following the accident. Brief at 11-12. The appeal was not about the number of medical records the ALJ cited in Mr. Blair's post-accident medical history (one). Instead, the appeal was about the adequacy of the findings, and the failure to explain why undisputed relevant material facts were omitted from the Interim Findings.

At bottom, the Interim Order's findings were indefensible. Either the ALJ believed the facts of his ongoing left leg and low back symptoms were irrelevant, or the ALJ discounted the evidence. If it was the former, then the medical panel would have had no need to make any additional findings as to left leg and low back symptoms,<sup>15</sup> and the ALJ's findings were inadequate because they omitted undisputed material facts. If it was the latter, there was no explanation as to why any undisputed evidence was discounted, and the findings were inadequate. The ALJ refrained from making any meaningful findings as to Mr. Blair's undisputed history of symptoms, as if that were the duty of the medical panel. Brief at 15. But the panel's limited job was to assist the ALJ in making medical determinations where there were conflicting medical opinions; not to make findings on undisputed medical facts.

B. There Was No Duty To Object To Interim Findings

The Brief also complained that Mr. Blair should have objected to the Interim

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<sup>15</sup> There was a factual vacuum, and the panel filled that vacuum with its own findings. It did so without the benefit of hearing the testimony, reviewing the pleadings, or understanding the issues or the law, except as stated in the Interim Order. Brief at 16-18. The panel was left to guess about the evidence, and they guessed incorrectly.

Order. Respondents' Brief at 23. But Mr. Blair had no duty to object to the Interim Order. No Labor Commission adjudication rules allow parties to make such objections, and none were cited by Respondents. In other words, Respondents' Brief concocted a rule, and argued that Mr. Blair did not follow it.<sup>16</sup>

Contrary to Respondent's argument, there was no rule that allowed – much less required – objections to Interim Orders. Interim Orders are essentially drafts. They can be modified at any time. By their own terms, Interim Orders are not final orders; they contemplate additional fact finding by the ALJ. Put another way, because Interim Orders contemplate additional action by the ALJs, then to allow (or require) such objections would be an invitation (or command) to shoot at a moving target.<sup>17</sup> That is not the law.<sup>18</sup>

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<sup>16</sup> Nor did the Commission make any such argument when it denied Mr. Blair's appeal. There are serious due process concerns implicated by citing to a non-existent rule, not relied on by the Commission in its denial. Apart from that, it is chicanery for Respondents to offer a non-rule as an excuse for the ALJ's inadequate findings of fact, and thereby avoid their own responsibilities to Mr. Blair.

<sup>17</sup> In contrast, there are rules that provide for filing objections to the Medical Panel Report. "A hearing on objections to the panel report may be scheduled if there is a proffer of conflicting medical testimony showing a need to clarify the medical panel report." UAR602-2-2.B. The panel report is the culmination of its limited role in Labor Commission proceedings, and typically, no further action is expected from the panel absent a specific judicial request. Put another way, the report is the panel's final action. In this case, Mr. Blair filed his objections to the medical panel report, and gave notice of the grave errors subsumed in the report. Those objections were over-ruled by the ALJ in her Order. R 73-77.

<sup>18</sup> Mr. Blair's counsel tried this approach many years ago in multiple other Commission cases, only to discover that no response is required from the ALJs. Owing to custom, or perhaps, the absence of a rule, counsel have no authority to make such objections.

Instead, ALJs are bound to make legally adequate findings of fact. To the extent they fail to do so in their Interim Orders, they may be corrected before entry of a final order. That did not happen here, and contrary to Respondent's suggestion, it was not Mr. Blair's fault. To the contrary, Mr. Blair asked the Commission to remedy the errors in this case, but it refused.

Instead, the Commission rubber-stamped the Interim Order's failure to make adequate findings. It explicitly approved the ALJ's omission of material facts, and the delegation of the ALJ's fact finding duties to the medical panel. Given the Commission's role as the ultimate finder of fact, and that it took over two years to ratify these errors, Mr. Blair respectfully asks this Court to provide appropriate guidance, if any, for the Commission to carry out its responsibilities as the ultimate finder of fact.

This Court should hold that the Interim Order was inadequate as a matter of law, because it omitted undisputed evidence of Mr. Blair's eight year history of left leg and low back symptoms that culminated in the surgical recommendation at issue, and led to prejudicial error at the medical panel, which was adopted by the ALJ and ratified by the Commission. This Court should reverse the Commission Order and remand this case for further proceedings consistent with the undisputed record evidence.

III. This Court Should Reverse Because Only Legally Adequate Findings Are Entitled To Substantial Evidence Review, But Even Assuming Arguendo That The Findings Were Legally Adequate, They Were Not Supported By The Record Evidence, Only The Flawed Panel Report.

This Court should hold that the Commission's Final Order was not entitled to substantial evidence review because its findings were legally inadequate and fundamentally flawed. The ALJ failed to make findings as to the nature and scope of Mr. Blair's admitted industrial low back injuries to L3/4 and L4/5.<sup>19</sup> Nor did the Interim Order contain the undisputed record evidence as to Mr. Blair's eight year history of left leg and low back symptoms following the accident.<sup>20</sup> The post accident findings amounted to two paragraphs of generalized comments, and a single citation to the medical records exhibit from shortly after the accident.<sup>21</sup> As if that weren't enough, the ALJ further erred by putting the entirety of Mr. Blair's past and future medical treatment at issue, instead of his limited claim of proposed surgery and pain clinic visits/epidural injections. Brief at 12.

As a consequence of inadequate findings of fact, and the failure to tailor the issues to the issue raised by the pleadings, the medical panel report was fundamentally flawed. The panel doctors were not law trained judges, and were not responsible for fixing the ALJ's legal errors. Not surprisingly, the report's findings contradicted Mr. Blair's

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<sup>19</sup> See discussion, *supra*, Parts I and II.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

admitted low back injuries. Brief at 17-18. Because the ALJ failed to detail the admitted scope of injury to the panel, then posed the wrong questions, the report found no medical causal connection between the accident and his subsequent medical treatment – a defense that was never raised by Respondents. Over Mr. Blair’s objections to the report, the ALJ incorporated the fundamentally flawed report into her Findings of Fact, Conclusions of Law and Order, R 73-77. More than two years later, the Commission finally ratified the entirety of those errors in its Order Affirming ALJ’s Decision (the “Order”). R 108-111. Against that backdrop, the Order was not entitled to substantial evidence review because its findings of fact were fundamentally flawed.

Respondents’ Brief never joined issue on the Order’s fundamental flaws in the Interim Order, and the subsequently flawed medical panel report. Instead, Respondents offered straw man arguments in support of the Order.<sup>22</sup> Having failed to join issue on the merits of Mr. Blair’s appeal, this Court should find that the Order was flawed. Because only legally adequate findings of fact are entitled to review for substantial evidence, the Order’s findings were not entitled to that deferential standard of review.

Arguing that the flawed panel report supported the flawed Order was like arguing that the house looked solid, despite its cracked foundation. This Court should hold that the ALJ’s findings of fact in the Interim Order were flawed, that the medical panel findings were consequently flawed, that the Commission approved the errant denial, and

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<sup>22</sup> See discussion, *supra*, Parts I and II.



failed to correct the flaws in its Order. This Court should hold that the flawed Order was not entitled to substantial evidence review.

*Assuming arguendo* that this Court reviewed the flawed Order for substantial evidence, it was not supported by record evidence, except for the flawed medical panel report, and the medical panel report was not supported by any record evidence. As shown in Mr. Blair's Brief, the medical records exhibit contained over twenty mentions of left leg and low back pain in the eight year history following Mr. Blair's industrial accident. Brief at 11. Even Dr. Moress admitted that Mr. Blair continued to have those symptoms since the accident, and while he had as much as a six month gap between flare ups, his symptoms never resolved. Answer, R 10-18. But the panel found that Mr. Blair's symptoms had "essentially resolved" three months after the accident. R 62. Further, Mr. Blair asserted that L3/4 and L4/5 were injured in the accident, and Respondents' answer never challenged the medical connection between the accident and those injuries.<sup>23</sup> Neither Dr. Moress, nor any other doctor in the record, disputed the causal connection between the accident and Mr. Blair's low back injuries at L3/4 and L4/5. *Id.* But the panel found that only L5/S1 was damaged in the accident. The panel's findings, which were later adopted wholesale by the ALJ and ratified by the Commission, were not supported by record evidence.

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<sup>23</sup> See discussion, *supra*, Parts I and II.

Respondents' Brief muddled up its arguments and did not cite to supporting record evidence. "[T]here was substantial evidence to support the Commission's findings that Petitioner does not require low back surgery on an industrial basis. The Commission found, consistent with the ALJ, the medical panel, and Dr. Moress that surgery was not necessary on an industrial basis." Respondents' Brief at 28. That argument, however, was not supported by the facts: Dr. Moress found that the surgery would not relieve Mr. Blair's symptoms. Brief at xii, R 10-18. Respondents Answer stated that the surgery was "not appropriate," and cited Dr. Moress. The ALJ asked the panel to determine if all of Mr. Blair's past and future medical treatment was necessitated by the accident, even though Dr. Moress' opinion did not put all of that treatment at issue. Respondents' Brief failed to identify even a scintilla of evidence that supported the panel report: There was no such evidence. Therefore, if this court reviews for substantial evidence, it should find that the medical panel report, and consequently, the Order, was not supported by substantial evidence, and that under those circumstances it was impossible, and inappropriate to require marshaling of the evidence.

IV. If The Natural Result Rule Applied to Mr. Blair's Facts, This Court Should Hold That The Commission Applied The Wrong Standard Because It Applies To All Subsequent Injuries Following A Compensable Industrial Accident.

If this Court holds that the only defense to the proposed surgery was whether it was "appropriate," it will not reach this issue. But if this Court holds that Mr. Blair was involved in a compensable accident, and that Respondents Answer challenged whether

the accident contributed to the need for the proposed surgery – and it did not – then it should find that the natural result rule should have been applied to Mr. Blair’s case.<sup>24</sup>

Respondents’ Brief admitted that the natural result rule was generally the test to determine if employers remain liable for subsequent medical treatment after a compensable accident. Respondents’ Brief at 19. But the Brief fashioned a new distinction never articulated by any Utah appellate court, or the Labor Commission. According to Respondents, the natural result rule in *McKesson* and *McKean* “articulate the standard of continuing benefits after a compensable industrial accident when the claim is later involved in a **non-industrial episode**.” Respondents’ Brief at 19 (bold in Brief). But the Brief contained no pin cite where the court explicitly limited the rule’s application to “non-industrial episodes.” *Id.* That is because neither this Court in *McKesson* nor the Supreme Court in *McKean* ever limited the rule to “non-industrial

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<sup>24</sup> Out of an abundance of caution, Mr. Blair’s Brief asserted that the ALJ “applied the wrong legal standard (medical causation) to Mr. Blair’s surgery claim, and in any case Respondents did not raise medical causation as a defense to Mr. Blair’s surgery claim.” Brief at 5. The thrust of Mr. Blair’s brief was that the ALJ ignored the pleadings that established the scope of his industrial injuries to included L3/4 and L4/5; that the interim findings included no findings as to the scope of his admitted industrial low back injuries; and that the ALJ put the entirety of Mr. Blair’s past and future medical treatment at issue when she asked the panel whether the accident was the medical cause of his need for surgery, instead of whether the proposed surgery was “appropriate.” Arguably, the natural result rule should not come into play because Respondents’ Answer never asserted that the accident “did not contribute” to the need for the proposed surgery. In retrospect, it is clear to Mr. Blair’s counsel that this Court may never reach this issue. That said, having raised the issue in his Brief, this section will clarify that the natural result rule applies to all subsequent injury cases, and that no appellate court or the labor commission has ever limited its application to the non-industrial accidents, as argued by Respondents.

episodes.” To the contrary, the purpose of the natural result rule has nothing to do with where the subsequent aggravation happens; it has everything to do with the connection between the work injury and the subsequent aggravation.

The purpose of the natural result rule was to determine if the subsequent treatment was a medical complication from a compensable injury. According to Larson, “the basic rule is that a subsequent injury, whether an aggravation of the original injury, or a new and distinct injury, is compensable if it is the direct and natural result of a primary injury. LARSON ON WORKERS’ COMPENSATION, § 10.00 (2000) (cited with approval in *Intermountain Health Care v. Board of Review*, 839 P.2d 841 (Utah App. 1992). Larson explains that the issue in “natural result” cases is “exclusively the medical issue of causal connection between the primary injury and subsequent medical complications.” *Id.* Once there was a compensable claim, the primary issue was the medical connection between the original accident and the subsequent complication. Accordingly, it was irrelevant whether the complication happened in an industrial or non-industrial setting.

Utah appellate courts have repeatedly emphasized the purpose of the natural rule. In one of the first natural result cases in Utah, *Perchelli v. Utah State Indus. Comm’n*, 25 Utah 2d 58, 475 P.2d 835 (Utah 1970), the employee injured his low back at work. Later, while at home, he sneezed, and had intractable back pain, which lead to surgery. The Supreme Court applied the natural result rule to find that the sneezing episode did not cut off the employer’s liability for the low back injury. Larson specifically identified

*Perchelli* as a leading case on the natural result rule: “This result is clearly correct. The presence of the sneezing incident[, which triggered pain and then disc surgery,] should not obscure the true nature of the case, which is nothing more than a further medical complication flowing from a compensable injury.” LARSON, *Id.* at § 10.02. Larson’s cited Utah law as a “clearly correct” example of the natural result rule.

This Court has also favorably cited this same section of Larson’s treatise in its decision, *Intermountain Health Care v. Board of Review*, 839 P.2d 841 (Utah App. 1992). In that case, an employee with a previous industrial low back injury lifted a baby, and immediately experienced increased pain that resulted in surgery. The medical panel of the Labor Commission found that the industrial injury contributed to the need for surgery, and the ALJ concluded that the surgery was the employer’s responsibility. This Court affirmed, and emphasized that the natural result test includes an analysis of the facts surrounding the subsequent injury and analysis of the connection between the subsequent injury and the [primary] injury.” *Id.* at 845-6 (citing LARSON, *Id.* at § 10.02 with approval). In short, no Utah appellate court has ever limited the natural result rule to “non-industrial episodes” because the purpose of the rule was to examine the connection between the work injury and the subsequent flare up; not where the flare up occurred.

Nor has the Labor Commission has ever made the distinction urged by Respondents. To the contrary, the Commission has applied the natural result rule to all aggravations, including work settings. In the case of *CM v. Midgley Huber Inc.*, (Labor

Commission Case # 00-1206, Issued 10/12/05), the employee had a low back injury with surgery in 1986, and later aggravated his low back at work for two different employers in 2000, resulting in lumbar fusion surgery. The medical panel opined that the 1986 accident contributed to the need for surgery, and the Commission awarded compensation and benefits. The Commission reasoned that

Of particular significance is the medical panel's opinion of a medical causal connection between [CM]'s spine injury and surgery related to the 1986 Midgley accident and [CM]'s subsequent medical problems. While the 1986 Midgley injury and spinal surgery may not be the only causes of [CM]'s ongoing medical problems, it is sufficient that the injury and surgery are a contributing cause of those problems.

(citing *McKesson v. Labor Comm'n*, 41 P.3d 468, 472 (Utah App. 2002), with approval).

In other words, neither the Utah appellate courts, nor the Commission, recognized the limitation on the natural result rule offered by Respondents. It was contrary to the purpose of the rule because it would exalt the location of the aggravation over the connection to the accident, and was plainly wrong. This Court should refuse to accept Respondents' invitation to ignore precedent and to make bad law.

*Assuming arguendo* that this Court finds that Respondents' answer challenged whether the accident contributed to the need for surgery – and it did not – this Court should hold that the natural result rule as set forth by the Utah appellate courts and the Commission, should apply to Mr. Blair's facts.

## CONCLUSION

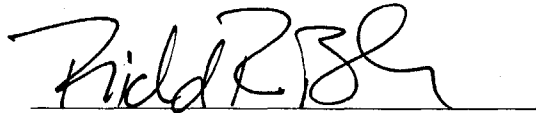
This Court should reverse and remand this case to the Commission. It should hold that the Interim Order's findings were inadequate as a matter of law because they failed to include the scope of Mr. Blair's low back injury to also include L3/4 and L4/5 established by the pleadings. This Court should hold that the Interim Order was also inadequate because it failed to include relevant, material facts as to Mr. Blair's eight year history of low back and left leg symptoms after the accident, that culminated in his need for surgery.

This Court should find that the Interim Order contained inadequate findings as to the undisputed medical facts, and left that duty to the panel. This Court should find that the panel found facts that contradicted the undisputed record evidence. This Court should also find that the Commission made no additional findings to cure the Interim Order, or the mischief that resulted from the panel's erroneous findings, and that instead, it ratified the fundamentally flawed process.

This Court should also hold that the Order was not entitled to substantial evidence review, but even assuming it was, the medical panel report was not supported by record evidence. This Court should reverse the Order, and remand this case with instructions to make additional findings consistent with the issues raised in the parties' pleadings, and present only the defenses identified in the Answer to the limited claims for surgery and pain clinic/epidural shots sought by Mr. Blair, to a new medical panel.

DATED this 9th day of March, 2011.

KING & BURKE, P.C.



Richard R. Burke

*Attorneys for Petitioner/Appellant  
Ollie Blair*

CERTIFICATE OF SERVICE

I certify that on the 9th day of March, 2011, I mailed a true and correct copy of the foregoing REPLY BRIEF and ADDENDUM TO BRIEF AND REPLY, first class postage prepaid, to the following:

Thomas Sturdy  
BLACKBURN & STOLL, LC  
257 East 200 South, #800  
Salt Lake City, Utah 84111

Alan L. Hennebold  
Deputy Commissioner  
LABOR COMMISSION OF UTAH  
160 East 300 South, 3d Floor  
Salt Lake City, Utah 84114

